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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DAVID CUSTODIO, Plaintiff and Appellant, v. CITY OF BRENTWOOD, Defendant and Respondent.	A094283 (Contra Costa County Super. Ct. No. C99 02722)

The California Plumbing Code (CPC) governs the installation, repair and maintenance of plumbing systems in California. (CPC, § 101.4.)[1] The CPC is one of a number of codes that regulate the building industry in California. (*International Assn. of Plumbing Etc. Officials v. California Building Stds. Com.* (1997) 55 Cal.App.4th 245, 248.) The State of California has preempted the field of building codes, and a local entity may only modify those codes under very limited circumstances. (*ABS Institute v. City of Lancaster* (1994) 24 Cal.App.4th 285, 293.)

The CPC is enforced by the "Administrative Authority," which is defined as the "[i]ndividual official, board, department or agency established and authorized by a state, county, city, or other political subdivision created by law to administer and enforce the provisions of the [CPC] as adopted or amended." (§§ 101.3 and 203.0.) "[D]uly authorized representative[s]" of those officials, boards, departments or agencies may also constitute the "Administrative Authority" entitled to enforce the CPC. (§ 203.0) In the

[1] All further statutory references are to the CPC unless otherwise noted.

City of Brentwood (City or Brentwood), the person charged with enforcement of the CPC is Louis Kidwell, Brentwood's chief building inspector.

One goal of the CPC is to prevent contamination of potable water, including domestic water supplied by a public or private water service system. (§§ 602.1 - 602.4.) Thus, no plumbing "fixture, device, or construction" may be installed or connected to any domestic water supply when that installation or connection may provide a "possibility" of polluting that water supply or "provide a cross-connection" between drinking water and "water which may become contaminated by such plumbing fixture, device, or construction unless there is provided a backflow prevention device approved for the potential hazard." (§ 602.3.) Section 603.1 provides that, before any device or assembly is installed to prevent backflow,[2] it must be approved by the Administrative Authority. Section 603.2 describes several backflow prevention devices, assemblies and methods.

In 1999, David Custodio, who does business as Bella Vista Plumbing, became the plumbing subcontractor on a dental office construction project (Project) in Brentwood. In the course of his work, he installed faucets on four sinks located in dental operating rooms. To prevent backflow, Custodio opted to use an "airgap," one of the methods, devices or assemblies set out in section 603.2. (§ 603.2.1.) Simply put, an "airgap" is the space between the lowest point (bottom) of a faucet and the top ("flood level rim") of the tank, vat or fixture into which water from the faucet flows. (§§ 203.0, 208.0.) CPC Table 6-3 establishes the "minimum" acceptable airgap in different applications. (§ 603.2.1.)

The City, acting through Kidwell, did not believe that the airgap device, assembly or method chosen by Custodio was adequate to protect against the danger of backflow in that particular application. Accordingly, Brentwood ordered Custodio to install additional, "mechanical" backflow prevention devices on the faucet assemblies. Custodio reacted by suing Brentwood, seeking an injunction precluding Brentwood from demanding that he install such mechanical backflow prevention devices. His motion for

[2] "Backflow" is defined as the flow of water into the distributing system of potable water from an unintended source. (§ 204.0.)

a preliminary injunction was denied. Custodio then installed the mechanical devices demanded by the City at a cost of $800 and amended his complaint to seek recovery of that sum. His amended complaint also sought a "declaration that [the City] unlawfully required" him to install mechanical backflow prevention devices. In addition, he sought a permanent injunction, preventing the City from doing the same things he sought to have the City precluded from doing by means of his motion for a preliminary injunction.

In pretrial proceedings, the trial court ordered the issues of "injunctive relief and application of the Plumbing Code" bifurcated from all other issues. Those issues were tried to the court over a two-day period. The court prepared detailed written findings. In essence, the court found that Brentwood acted reasonably under the CPC in requiring the installation of mechanical backflow prevention devices.

On appeal, Custodio advances two arguments. He first asserts that the trial court erred in interpreting the CPC. As he sees matters, he was entitled to prevent backflow by use of the airgap device, assembly or method described above, and the City had no power to require him to install mechanical backflow devices. Accordingly, he argues that he was—is—entitled to the relief sought in his amended complaint. Custodio also contends that the court abused its discretion in failing to strike the cost of a deposition transcript as an item of the City's recoverable costs.

We conclude that Custodio was not—and is not—entitled to any of the relief sought in his amended complaint. We also conclude that the trial court did not abuse its discretion in awarding the City the cost of securing a copy of the deposition transcript in question. We finally deny a motion to consider additional evidence on appeal and affirm the judgment below.

I. FACTS

A. *Trial*

Evidence introduced at trial consisted of several stipulated facts, three declarations of experts that were admitted by stipulation, cross-examination of the experts, and limited testimony from Kidwell and Custodio. The parties stipulated to four facts: (1) Custodio installed electronic handwashing faucets at the "handwash" sinks at the Project; (2) the

airgap for those sinks was greater than one inch and less than five inches; (3) the City did not require mechanical backflow prevention devices on the lunchroom and bathroom sinks at the Project; and (4) Custodio eventually installed mechanical backflow prevention devices inside the cabinets of the four handwash sinks at the Project.

Custodio offered declarations of two experts, Melvyn Seid and Del Wilburn, both of whom opined that the CPC does not require the installation of mechanical backflow devices in addition to the protection offered by an appropriate airgap. The City offered the declaration of a single expert, Dan McEvilly, who opined that the City acted within its authority in requiring Custodio to install sinks with airgaps of at least five inches or to install faucets with additional, mechanical backflow prevention devices. On cross-examination, McEvilly stated that the faucets installed by Custodio did not comply with the CPC because they had aerators on them that could be removed, permitting the faucets to be used in improper (dangerous) ways. In addition, the faucets installed by Custodio had threaded ends that permitted a user to attach something, such as a hose, to them, creating a risk of cross-contamination.

Kidwell's direct testimony was presented by an offer of proof from the City. The City stated that Kidwell would testify that he and his staff became concerned about the contamination of water in dental offices by hepatitis, HIV and other potential diseases and contaminants. He and the staff also became concerned about backflow, especially when faucets contain aerators. When Custodio asked to use the devices he actually installed, Kidwell told him it was acceptable to install devices with no aerators and greater airgaps than the ones he had already installed or to install additional anti-backflow prevention devices. Kidwell had no animus toward Custodio and had had no dealings with him prior to the Project. Custodio testified that he paid for the additional devices required by the City out of his own pocket. He admitted that he probably could have submitted a change order to the owner or general contractor and thus have been reimbursed for that cost. However, he stated that doing so was not in keeping with his practice.

In its findings, the court first determined that Custodio had standing to advance the claims made in his complaint, even though he was not the building owner. However, the court ultimately concluded that Custodio did not meet his burden of establishing that the City abused its discretion in requiring him to install "additional" devices, beyond an airgap installation, to prevent backflow. The court agreed with Custodio that the City could not require him to install a system or use a method not provided for in the CPC. Nonetheless, the court concluded that nothing in the CPC precluded that City from requiring the use of more than one method or device for backflow prevention. Finally, the court found that the City's decision was not unreasonable, capricious or arbitrary. The court denied Custodio's "prayer for injunctive relief." The court determined that Custodio's request for declaratory relief was improper because the complaint included no cause of action or prayer for such relief. In addition, the court found that the "relief sought" was merely a "declaration of existing legal principles, none of which are dispositive of the issues in this case." The court also invited the parties to submit statements indicating whether additional issues remained to be adjudicated. In light of the court's findings at trial, the parties agreed that nothing remained to be resolved by the court. Judgment was thereafter entered in favor of the City.

B. *Motion to Strike Costs*

Following service of the court's findings, the City submitted a cost bill. Custodio then filed a motion, seeking to strike some of the City's claimed costs. One of the cost items Custodio sought to have stricken was the sum of $237.77 for the deposition of Lloyd Dinkelspiel. Custodio asked that that item be stricken because (a) the City did not take the deposition, (b) the deposition was not used at trial, and (c) the City did not "incur" the cost of the deposition. In opposition, the City pointed out that Dinkelspiel is a City employee, whose deposition was taken by Custodio. The City noted that it sought only the cost of securing a copy of the transcript of the deposition. The court denied Custodio's motion to strike deposition costs and granted the motion to strike expert witness and arbitration fees.

II. ANALYSIS

A. *Framework for Analysis of CPC-Related Issues*

As reflected above, Custodio claims that he was entitled to use only an airgap to prevent backflow and that Brentwood improperly required him to install mechanical backflow prevention devices. Thus, he claims that he was—and is—entitled to each of the forms of relief prayed for in the amended complaint—specifically, injunctive relief, declaratory relief , monetary damages and attorney fees.

As analyzed in part II.B. below, Custodio misinterprets the CPC. The City was empowered under the CPC to require the additional mechanical devices. Thus, the trial court did not err in denying relief to Custodio, as a matter of statutory interpretation. In part III.C., we will discuss additional reasons why Custodio was not—and is not—entitled to the relief prayed for in the first amended complaint.

B. *Brentwood Did Not Act in Violation of Statute in Requiring the Installation of Mechanical Backflow Prevention Devices*

1. *The CPC vests the Administrative Authority with broad discretion to approve or disapprove the means employed to prevent backflow*

The heart of Custodio's appellate claims is that the trial court erred in interpreting the CPC. Because no substantial factual dispute exists regarding the interpretation of the CPC, such interpretation constitutes a matter of law, which we undertake de novo. (*Building Industry Assn. v. City of Oceanside* (1994) 27 Cal.App.4th 744, 771.)

In our view, the City was clearly authorized to require Custodio to install mechanical backflow prevention devices. The City's authority was conferred by at least two provisions of the CPC. First, section 603.1 provides: "Before any device or assembly is installed for the prevention of backflow, it shall have first been approved by the Administrative Authority. Devices or assemblies shall be tested for conformity with recognized standards or other standards acceptable to the Administrative Agency which are consistent with the intent of [the CPC]." In addition, section 603.3.1 provides: "All assemblies shall conform to listed standards and be acceptable to the Administrative

Authority having jurisdiction over the selection and installation of backflow prevention assemblies."

In simple terms, both statutes require that the means employed to prevent backflow meet certain standards. In addition, both contemplate prior approval or acceptance by the Administrative Authority of the means selected by an owner or a contractor for backflow prevention. Here, Custodio did not seek *prior* approval or acceptance of an airgap to prevent backflow. Nonetheless, when confronted with Custodio's unilateral, unapproved choice, the City did not *require* Custodio to *remove* the system he installed. It merely required him to do one of two things: (1) install an additional, mechanical device that it had actually approved or (2) employ an airgap system with no aerators and a gap of more than five inches. The plain language of sections 603.1 and 603.3.1 conferred that authority on the City.

Custodio nonetheless asserts that the City exceeded the authority granted to it under the CPC. As he reads the CPC, once he installed faucets with an airgap equal to, or greater than, the minimum gap established in the CPC, the City had no right to tell him to install additional, mechanical devices.[3] Custodio presents arguments falling into two categories in an effort to persuade us that the City exceeded its authority. Custodio first argues that sections 603.1 and 603.3.1 cannot properly be interpreted to permit the City to approve or disapprove his use of an airgap that met the minimum standards set by the CPC. He then argues that principles of preemption preclude the City's choice to require him to install an additional mechanical device. We will consider the arguments in the order presented by Custodio.

[3] Custodio did not allege in his complaint that the City lacked authority to impose its alternative directive: installation of a system with no aerators and an airgap of greater than five inches, nor did he seek to enjoin the City from imposing that alternative requirement. Further, he does not assert on appeal that the City lacked the authority to impose that requirement.

2. *Sections 603.1 and 603.3.1 gave the City authority to require Custodio to install devices approved by that entity*

In support of his first argument, Custodio points out that section 603.1 only permits the Administrative Authority to approve "devices and assembl[ies]" and that section 603.3.1 only gives the Administrative Authority power to accept backflow prevention "assemblies." He then asserts that it would be improper to insert the term "methods" into either section as a vehicle for conferring authority on the Administrative Authority to approve or disapprove his choice of an airgap to prevent backflow. Custodio's argument lacks merit from several different perspectives.

We first observe that Custodio cites no provision of the CPC that defines the use of an airgap as a "method" of preventing backflow, as opposed to an "assembly" or a "device" for doing so, and our independent examination of the CPC has not led us to any such provision. Thus, we see no basis for inferring that sections 603.1 and/or 603.3.1 did not confer upon the City the power to accept or approve an airgap system, as opposed to any of the other means of preventing backflow set out in section 603.2.

In addition, Custodio ignores the statutory scheme relating to the prevention of backflow. Statutes should be construed with reference to the scheme of which they are a part. (*Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 489.) It is evident that the purpose of section 602 et seq. is the prevention of the contamination of potable water from backflow. To that end, the Administrative Authority is given the power to approve and/or accept the means proposed to prevent that contamination. The right to *disapprove* is implied in the power of approval and/or acceptance. A construction of sections 603.1 and/or 603.3.1 that would permit a building owner or plumbing contractor to circumvent the approval or *disapproval* of the Administrative Authority merely by choosing to employ an airgap to prevent backflow would be in direct conflict with the purpose of the statutory scheme of which those sections are a part. Moreover, such a construction would contravene the plain language of both sections. As reflected above, both statutes require that the means chosen conform to certain standards *and* that the Administrative Agency approve or accept the means selected by the owner or contractor. The second

requirement implies that the Administrative Agency has discretion to reject a particular means of preventing backflow in a particular application or to require the use of a different backflow prevention system in that application—even if it otherwise conforms to the standards set out in the CPC. In ordering Custodio to install mechanical backflow prevention devices, the City merely exercised the discretion conferred on it by the CPC. We see no basis for concluding that it abused that discretion. As established by Kidwell's testimony, the City had well-founded concerns about the spread of deadly diseases in dental offices and acted reasonably in requiring special protections to guard against the spread of those diseases by means of backflow in handwash sinks.

3. *Principles of preemption did not preclude the City's choice to require Custodio to install mechanical backflow prevention devices*

In support of his final argument, Custodio points out that an airgap is one of the means of preventing backflow described in section 603.2. He argues that, because he chose to employ one of the means set out in that section, the City lacked the power to require him to install an additional one. In support of that argument, Custodio contends that (a) the State has preempted the field of building codes, and (b) the CPC does not permit an Administrative Authority to require the installation of more than one method, device or assembly to prevent backflow. Thus, in ordering installation of an additional device, the City must have relied on a local rule or regulation that exceeded the requirements of the CPC—something the City could not do in light of the state's preemption of the field. Custodio's argument lacks merit. First, here, the City did not purport to impose a requirement that is not found in the CPC. Indeed, as indicated in Kidwell's testimony, the City relied on the CPC, not a local ordinance, in making its demands of Custodio. Moreover, the mechanical devices required by the City were among those listed in section 603.2. Thus, the City did not act in contravention of statute in a preempted field. Second, Custodio's argument depends on a strained interpretation of section 602 et seq., specifically, that an Administrative Authority lacks the power to require that a contractor or owner employ more than one device, assembly or method to prevent backflow. Put somewhat differently, Custodio would have us interpret the CPC

as *forbidding* an Administrative Authority to require an owner or a contractor to employ more than one of the methods, devices and assemblies listed in section 603.2. We see nothing in the CPC supporting such an interpretation.

C. *Custodio Was Not—and Is Not—Entitled to Relief on the Amended Complaint or on Appeal*

1. *The trial court did not err in denying prohibitory injunctive relief, and Custodio's appellate request for injunctive relief is moot*

In his original complaint, Custodio asked for a temporary restraining order, a preliminary injunction and a permanent injunction, enjoining the City from: (1) demanding that mechanical backflow devices be installed at the Project; (2) delaying approval of the Project as a vehicle for inducing Custodio to install mechanical backflow devices; and (3) deviating from normal inspection practices or delaying acceptance of the project as a means of retaliation—assuming that Custodio refused to install the additional devices. He also asked that the City be required to certify that the airgap employed at the Project was an "appropriate and sufficient" method of backflow prevention. After his motion for a preliminary injunction was denied, he amended his complaint. However, the injunctive relief he sought in the first amended complaint was the same as he sought in the original.

We first observe that, by the time Custodio amended his complaint, he had already installed the mechanical backflow devices demanded by the City. The three numbered injunctive requests set out above involved restraints or potential restraints on the City's power to act in relation to Custodio's installation of faucets and employment of various backflow prevention devices, assemblies, and/or methods *on the Project*. When the case went to trial, it was too late to restrain the City in the manner requested by Custodio.[4] As noted, the additional mechanical backflow devices had already been installed, and no evidence was presented at trial to indicate that the City failed to approve the work in a

[4] It may be argued that Custodio's mandatory injunctive request that the City certify his choice to use an airgap for backflow prevention constitutes a request for a declaration that the City erred in requiring him to do more—that is, install mechanical backflow prevention devices. We will consider that possibility in part II.C.2., *post*.

timely fashion or that the City retaliated against Custodio in any way. Thus, he was plainly not entitled to prohibitory injunctive relief at trial.

Custodio's appeal from the court's failure to grant him injunctive relief is also procedurally untenable. Simply put, this court cannot order something not to be done that has already been done. Thus, the appeal from the trial court's failure to grant the injunctive relief sought in the first amended complaint is moot. (*Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 10-11.)

2. *Custodio Did Not Establish a Right to Declaratory Relief*

Neither the original complaint nor the first amended complaint contained a cause of action for declaratory relief. However, the prayer of the first amended complaint contained a request for a "declaration that [the City] unlawfully required [Custodio] to install mechanical backflow prevention devices." That request was the mirror image of Custodio's mandatory injunctive request that the City be required to certify that the airgap he employed was an "appropriate and sufficient method" of backflow prevention under the CPC.

Declaratory relief is only available if an actual, present controversy or a "probable future, controversy" exists between the parties to litigation. (*Sherwyn v. Department of Social Services* (1985) 173 Cal.App.3d 52, 58.) Here, both the specific declaratory relief and the mandatory injunctive relief sought by Custodio reflect the fact that the controversy between him and the City arose in the past. Further, Custodio did not plead—and he introduced no evidence at trial to establish—that he anticipated being the plumbing subcontractor on a dental building in Brentwood in the future. Thus, he established neither an actual, present controversy nor a probable future controversy for resolution by means of declaratory relief.

3. *Damages*

As reflected in the introduction to this opinion, the trial court tried certain legal issues in a bifurcated proceeding. Because the court concluded that Custodio was not entitled to relief under the CPC, it never reached any issues pertaining to damages. We nonetheless offer two observations about the seemingly insurmountable burden Custodio

would have faced, had the court reached the issue of damages. We first note that, even if Custodio had established that he was harmed by Kidwell's allegedly wrongful requirement that he install mechanical backflow prevention devices at a total cost of $800, he would not have been entitled to recover damages, absent a showing that Kidwell acted in bad faith. Section 102.2.6 provides that the Administrative Authority, "acting in good faith and without malice in the discharge of [his or its] duties, shall not thereby be rendered personally liable for any damage that may accrue to persons or property as a result of any act or by reason of any act or omission in the discharge of duties." Here, the City presented undisputed evidence at trial, through Kidwell's testimony, that he acted solely out of concern about the possible spread of communicable diseases in requiring the additional backflow prevention devices and that he had never had any prior dealings with Custodio. Thus, even if Kidwell's actions had been unauthorized under the CPC, Kidwell, in his capacity as the Administrative Authority, unquestionably acted in good faith and without malice toward Custodio. As such, the Administrative Authority could not be held liable to Custodio. (§ 102.2.6.)

We also note that Custodio's trial testimony seemingly established that he could have avoided incurring the cost of installing the mechanical backflow prevention devices by submitting a change order to the general contractor and/or the owner; however, he chose not to take that step. As a general rule, a plaintiff has a duty to mitigate damages and may not recover losses he could have avoided through reasonable efforts. (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1568.) Here, it appears as if Custodio's failure to avoid damages—or his *choice* to *incur* damages—would certainly have precluded any recovery from the City, even if he had been able to establish liability on the City's part.

4. *Custodio Was Not Entitled to an Award of Attorney Fees*

On appeal, Custodio contends that he was entitled to attorney fees under Civil Code section 52.1 (violation of civil rights) and/or Code of Civil Procedure section 1021.5 (private attorney general). Because Custodio was not the prevailing party at trial and is not entitled to reversal, based on the analysis set forth in this opinion, he was not—

and is not—entitled to recover attorney fees. (§ 52.1, subd. (h); § 1021.5 [attorney fees awarded only to "successful" party].)

D. *The Trial Court Did Not Abuse Its Discretion in Allowing the City to Recover the Cost of Securing a Copy of Dinkelspiel's Deposition Transcript*

Custodio argues that the trial court abused its discretion in allowing the City to recover the cost of securing a copy of the transcript of Dinkelspiel's deposition. He asserts that, once he objected to the inclusion of that cost item, the burden shifted to the City to demonstrate, pursuant to Code of Civil Procedure section 1033.5, subdivision (b)(2), that the cost was "reasonably necessary" to the litigation, rather than "merely convenient or beneficial to its preparation." He contends that the City failed to meet its burden, noting that (a) Dinkelspiel did not testify and (b) his deposition was not used by either side at trial. Custodio is correct that the trial court's decision regarding the allowance or disallowance of an item of costs is reviewed for abuse of discretion. (*Brake v. Beech Aircraft Corp.* (1986) 184 Cal.App.3d 930, 939 (*Brake*).) However, he has failed to demonstrate such an abuse of discretion here.

Custodio fails to consider the fact that *he* took Dinkelspiel's deposition. Custodio cites, and we are aware of, no authority indicating that a party may not recover the cost of securing a copy of the deposition of one of its own employees, when the deposition is taken by that party's opponent. If the City had taken the deposition of its own employee and if that deposition had been of no significance to the litigation, Custodio might well argue that taking the deposition was merely convenient to trial preparation. However, once Custodio took the deposition, the City was certainly entitled to obtain a copy of it. Under Code of Civil Procedure section 1033.5, subdivision (a)(3), the cost of the copy was an "allowable" one. We see no abuse of discretion in the trial court's judgment to permit the City, as the prevailing party, to recover that cost item. (*Brake*, *supra*, 184 Cal.App.3d at p. 939.)

E. *Custodio's Motion for Leave to Produce Additional Evidence on Appeal is Denied*

On July 11, 2001, Custodio filed an amended motion for leave to produce additional evidence for consideration by this court. On August 27, 2001, we deferred the

motion for resolution until the appeal was considered on its merits. The documents attached to Custodio's motion consist of what Custodio represents to be a Brentwood ordinance, dated September 14, 1999, adopting the 1998 State Building Standards Code with local amendments. Custodio asks that we consider the documents presented because they purportedly demonstrate that the City "repeatedly and continually creates and enforces building standards in a manner contrary to California law." We fail to see the relevance of those documents to any argument or issue involved in the instant appeal. Accordingly, the motion is denied.

III. DISPOSITION

The judgment is affirmed. Custodio to bear costs of appeal.

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McGuiness, P.J.

We concur:

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Corrigan, J.

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Parrilli, J.